MOTION FILED
OCT 7 1986

No. 6, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

MOTION FOR LEAVE TO FILE PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF, PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF, AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

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October 6, 1986

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CERTIFICATE OF SERVICE

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STATE OF NEBRASKA,
Plaintiff.

v.

STATE OF WYOMING,
Defendant.

MOTION FOR LEAVE TO FILE PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

The State of Nebraska hereby moves for leave to file its petition for an order enforcing the Court's Decree of October 8, 1945, as modified on June 15, 1953, and for injunctive relief against the State of Wyoming.

Respectfully submitted,

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STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

The State of Nebraska hereby petitions the Court for an order enforcing the provisions of its Decree of October 8, 1945, as amended on June 15, 1953, and for injunctive relief against the State of Wyoming, and in support hereof states:

1. The Decree in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), equitably apportions the waters of the North Platte River among the states of Colorado, Wyoming, and Nebraska.

2. The Decree is premised on the recognition that Pathfinder and Guernsey Reservoirs in Wyoming are operated primarily for the benefit of lands in Nebraska. Consequently, the Decree establishes restraints on storage of water in those reservoirs to protect water users in Nebraska.

3. The State of Wyoming is presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the Decree by:

a. Depleting the flows of the North Platte River by the operation of Greyrocks Reservoir on the Laramie River, a tributary of the North Platte River;

b. Depleting the flows of the North Platte River by the proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and the North Platte rivers;

c. Depleting the natural flows of the North Platte River by the proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir; and

d. Actions by state officials to prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska.

4. The current and imminent actions of the State of Wyoming contravene the Court's opinion and invalidate the equitable balance of the North Platte River established in the Decree.

5. Despite the State of Nebraska's efforts to resolve these matters, the State of Wyoming has refused to alter its actions and it continues to violate the provisions of the Decree.

6. The State of Wyoming's present and threatened violations of the Decree are causing and will cause irreparable injury to the State of Nebraska and its citizens.

7. The State of Nebraska has no effective remedy at law to enforce its rights against the State of Wyoming. Injunctive relief is necessary to enforce the Decree and to restrain further violations by the State of Wyoming.

8. The Court expressly retained jurisdiction to resolve the present controversy in Article XIII of the Decree of October 8, 1945, as modified on June 15, 1953, which provides:

> The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:
>
> * * *
>
> (c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir . . .;
>
> * * *
>
> (f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

WHEREFORE, the State of Nebraska prays that the Court enter its order requiring the State of Wyoming to comply with the provisions of the Decree of October 8, 1945, as modified on June 15, 1953, and enjoining the State of Wyoming from increasing its depletion of the natural flows of the North

Platte River in violation of the State of Nebraska's apportionment under the Decree.

Respectfully submitted,

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BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

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STATE OF WYOMING,
Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

STATEMENT OF THE CASE

This is an action to enforce the apportionment made to the State of Nebraska pursuant to the Court's Decree of October 8, 1945, in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), and to enjoin the State of Wyoming's continued and threatened violations of the Decree.* The retained jurisdiction of the

* Because of a different procedure for assigning docket numbers, this case has been numbered 5, 6, and 16. The decree we seek to enforce follows the reported opinion at 325 U.S. 589 (1945), which is docketed as Original No. 6. Given the age of the case and the abundance of docket numbers, the Court may wish to assign a new docket number to the case for the purpose of these proceedings.

Court is invoked under Article XIII of the Decree, Article III, Section 2, Clause 2 of the United States Constitution, and the Judiciary Act, 28 U.S.C. Section 1251(a).

STATEMENT OF FACTS

The Court's Decree apportions the waters of the North Platte River among the states of Colorado, Wyoming, and Nebraska. The State of Wyoming is violating and threatens to violate the Decree by depletion of the flows of the North Platte River resulting from existing and proposed reservoirs, river pumping, and diversion facilities on tributaries of the North Platte and the Laramie rivers. These violations of the Decree disrupt the equitable balance of the river and deprive the State of Nebraska of its lawfully established entitlement under the Decree.

The State of Wyoming's unlawful actions will cause the State of Nebraska to suffer substantial economic, ecological, and environmental injuries. Initial analyses of the economic impact of the present and imminent depletion of the natural flows of the North Platte River apportioned to the State of Nebraska show annual losses of $363,580.00 in increased power costs, $620,046.00 in lost farm income, $1,329,533.00 in the value of agricultural production, and $3,656,217.00 in statewide economic output.

POINTS OF LAW

In this case the Court initially determined that a genuine controversy existed between the states, premised on proposed diversions in Wyoming which would have adversely affected downstream senior appropriators in Nebraska. In response to the evidence of detriment, the Court fashioned a decree which equitably apportioned the waters of the North Platte River and recognized the need for flexibility in the administration and enforcement of its provisions. *See, e.g., Nebraska v. Wyoming,*

325 U.S. 589, 622-23 ("If conditions of supply substantially change, any party can apply for modification of the decree. The decree will not necessarily be for all time. Provision will be made for its adjustment to meet substantially changed conditions."); *id.* at 625 ("If such threat appears and it promises to disturb the delicate balance of the river, application may be made at the foot of the decree for an appropriate restriction."); *id.* at 654 ("We cannot conclude that the segregation of natural flow and storage water lacks feasibility. If a comprehensive formula can be agreed upon, it may later be incorporated in the decree.").

Finally, the Court discussed with approval and adopted the proposal of the Special Master that the Court retain jurisdiction. *Id.* at 655. In Article XIII of the Decree the Court expressly retained jurisdiction to address changes in condition as well as certain anticipated matters:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:
>
> * * *
>
> (c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir . . ..
>
> * * *

(f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

On the face of the Court's opinion and the Decree, it is clear that the Court's continuing jurisdiction may be invoked to seek redress for the current and threatened harm to Nebraska's apportionment pursuant to the terms of the Decree.

The Court's retention of jurisdiction is consistent with precedent. Beginning with *Wyoming v. Colorado*, 259 U.S. 419 (1922), the Court recognized the need for continuing jurisdiction to enforce its equitable apportionment decrees. *See Wyoming v. Colorado*, 286 U.S. 494 (1932) (action brought to enforce the decree and obtain injunction restraining Colorado from taking diversions in excess of that permitted by the decree); *Wyoming v. Colorado*, 298 U.S. 573 (1936) (bill in equity brought by Wyoming regarding violations of the decree in which partial injunctive relief was granted and the Court expressly retained jurisdiction); *Wyoming v. Colorado*, 309 U.S. 572 (1940) (petition for a show cause order requiring Colorado to demonstrate why it should not be adjudged in contempt for violations of the decree). Similarly, the Court retained and continued to exercise its jurisdiction in *Wisconsin v. Illinois*, 278 U.S. 367 (1929), 281 U.S. 179, decree entered, 281 U.S. 696 (1930), temporarily modified, 352 U.S. 945 (1956), 352 U.S. 983 (1957), superseded, 388 U.S. 426 (1967), and in *New Jersey v. New York*, 283 U.S. 336, decree entered, 283 U.S. 805 (1931), modified, 347 U.S. 995 (1954). Both *Wisconsin v. Illinois* and *New Jersey v. New York* involved decrees which contained retention of jurisdiction clauses substantially the same as that involved in the present case.

In *Arizona v. California*, 460 U.S. 605 (1983), the Court analyzed the need for retention of jurisdiction. The Court stated that its "purpose in retaining jurisdiction . . . can be gleaned from the respective reports of the Special Masters,

which note the need for flexibility in light of changed conditions and questions which could not be disposed of at the time of an initial decree." *Id.* at 624. The Court also stressed that this flexibility is consonant with the authority of a court of equity "to modify an injunction in adaptation to changed conditions." *Id.* at 624-25, quoting *Railway Employees v. Wright*, 364 U.S. 642, 647 (1961). It is apparent that the retention of jurisdiction is a necessary attribute of equitable apportionment cases. *See Arizona v. California*, 460 U.S. at 625.

The Court's retention of jurisdiction was predicated on the possibility of harm to downstream users as a result of potential development. Wyoming's present and threatened interference with the equitable balance of the river and its interference with Nebraska's apportionment necessitates the exercise of the Court's retained jurisdiction. Accordingly, the Court should grant Nebraska's motion for leave to file its petition to enforce the provisions of the Decree and for appropriate injunctive relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify that three true and correct copies of the foregoing Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief, Petition for an Order Enforcing Decree and for Injunctive Relief, and Brief in Support of Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief were served on each of the following parties required to be served, in accordance with U.S. Supreme Court Rule 9.3, by depositing the same in the United States mail with first-class postage prepaid and addressed on this 6th day of October to:

The Honorable Charles Fried
United States Solicitor General
United States Department of Justice
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The Honorable Ed Herschler
Governor of the State of Wyoming
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The Honorable Archie G. McClintock
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The Honorable Richard D. Lamm
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